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EXPORT RULES FOR THE TEST AND EVALUATION PROFESSIONAL

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ABSTRACT

Basic knowledge of the US International Traffic in Arms Regulations (ITAR) is in the Test and Evaluation (T&E) professional's best interests. Compliance with the ITAR on some projects may be necessary and may seem burdensome, even frustrating. But non-compliance is not an option.

While not an all-encompassing primer on import/export regulations, this paper serves as a wake up and reminder on key requirements, and highlights some of the current rules.

INTRODUCTION

Economic pressures have complicated international trade in weapons systems, including T&E of those systems. The same pressures have made "outsourcing" an attractive option for many project managers. In the past, a few industrial giants would bear the brunt of import/export rules. But it's a different world today. Numerous, comparatively small enterprises are competing in the global economy. Even in a large company, you can find your project being severely impacted by not factoring in the time and resources required to comply with the ITAR.

It is not all that easy to keep your nose clean when it comes to complying with the ITAR. Still, the T&E community must comply with it. You should beware rules such as:

"Because the exercising of the foreign affairs function, including the decisions required to implement the Arms Export Control Act, is highly discretionary, it is excluded from review under the Administrative Procedure Act"

"..will give notice to the

respondent to answer the charges within 30 days, as provided in para 128.5(a), and indicate that a failure to answer will be taken as an admission of the truth of the charges."

In a way, you are presumed guilty before proven innocent.

And you must be able to interpret government language such as:

"The exemptions provided in this subchapter do not apply to transactions in which the exporter or any party to the export (as defined in section 126.7(e) of this subchapter) is generally ineligible as set forth above in paragraph (c) of this section, unless an exception has been granted pursuant to §126.7(c) of this subchapter."

It appears from the above that many of the well-known rules of legal proceedings may not fully apply under the ITAR. Even if the IRS does not worry you, if you're a T&E manager, you had best worry about the ITAR more than most people worry about the IRS. Got worry?

So you ask, what does the ITAR have to do with me? Well, in addition to the above dire warnings, "Any person who engages in the United States in the business of either manufacturing or exporting defense articles or furnishing defense services is required to register with the Office of Defense Trade Controls. Manufacturers who do not engage in exporting must nevertheless register."

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Guess what? If you provide T&E services, and you send T&E data or hardware overseas (or to non-U.S. citizens), you may be subject to ITAR controls. If you build certain T&E equipment that is used for military systems, you're "captured," even if you do *not* export. Feeling better? Perhaps not. What will this cost you? The registration fee is \$600 per year.

If you are a member of a large company, you probably have an export control officer who will handle issues for you - if you are lucky. If you are not lucky, you will have to dig through the public notices in the Federal Register and determine just what needs to be disclosed, what needs to be reported...and what requires a U.S. Government export license.

Who in the Federal Government is involved in ITAR concerns? Well, it is a full list, including:

- Your local Postmaster
- The Department of Commerce
- The Department of State
- The Department of Defense

- The Department of the Treasury (ATF, Customs)
 - The US Patent and Trademark Office
 - The District Director of Customs
- Oh, and the Congress is directly involved for some cases. Sorry - that's the law.

For the sake of national security and international harmony, the Federal Government has passed several laws, which in turn have been implemented by rules promulgated in the Federal Register. Of prime importance is the Arms Export Control Act (AECA), 22 U.S.C. 2778, which authorizes the President to control the export and import of defense articles and defense services. Augmenting that is the Missile Technology Control Regime (MCTR) - a multi-lateral, non-treaty, high-level diplomatic protocol. The ITAR implements both the AECA and, to some extent, the MCTR. Not exactly riveting reading, but of definite interest to you and your professional activities.

DEFINITIONS

First some definitions: like many used by the government, they might not fit those that you are familiar with

Defense article: Any item OR technical data so designated by the Department of State. This includes technical data recorded or stored in any physical form, model, or mock-up, and many related services. Information sent over the Internet could be included. Items and technical data judged as defense articles to date include:

Firearms	guns up to .50 caliber
Artillery Projectors	big guns
Ammunition	ammunition and components thereof
Launch Vehicles	Rockets, Non/nuclear warheads, and many items dealing with such
Explosives	explosives
Vessels of War	Combat ships and boats
Tanks and military vehicles	tanks, bridges, engines
Aircraft	jets, helicopters, blimps, drones, lighter than air craft, and many engines.
Military Training equipment	simulators
Protective Personnel Equipment	body armor, guilly suits
Military electronics	sonar, radios, computers, ELINT...
Fire Control, Range Finders	Fire control and range finders
Auxiliary Military Equipment	Cameras, spy stuff, cryptographic equipment, SCUBA, Carbon/carbon billets, stealth stuff, energy conversion from solar to electrical, particle beam and e-beam technologies
Toxicological Agents	Bugs and Drugs
Spacecraft Systems	satellites including associated ground control and communications, GPS systems, propulsion systems, Radiation

	hardened circuits
Nuclear Weapons	nuclear weapons
Classified Articles	items Confidential and above
Submersible Vessels	submarines
Miscellaneous Articles	Items so decided by the Director of the Office of Defense Trade Controls.

If the above seems like an all-inclusive list, making anything that you do subject to controls, (and making you vulnerable to fines and imprisonment), it is not *that* onerous. There are numerous exceptions. But you should know a few more ITAR definitions:

Defense Service: the furnishing of assistance, including training to foreign persons in the design, development, engineering, manufacture, productions, assembly, **TESTING**, repair, maintenance, modifications, operation, demilitarization, destruction, processing, or use of defense articles.

Technical data: Information which is required for the design, development, production, manufacture, assembly, operation, repair, **TESTING**, maintenance or modification of defense articles. This includes blueprints, drawings, photographs, plans, instructions and documentation.

Export: Sending out of the United States (except for what resides in your head when you go overseas [or visit a foreign embassy]), of a defense article, transferring registration of an aircraft, vessel or satellite, disclosing to a foreign person (including oral or visual disclosure), and performing a defense service for a foreign person, here or abroad.

Person: a human, as well as a corporation, business association, partnership, society, trust or other entity, organization or group, including governmental entities.

US Person: a lawful permanent resident (citizen or green card holder) or any non human person incorporated in the US.

Foreign Person: basically not a US person

Empowered Official: a US person who is employed by an applicant for export who understands the export rules, and has the independent authority to inquire into any aspect of a proposed export, can verify the legality of a transaction, and can refuse to sign without prejudice or other adverse recourse.

Significant Military Equipment: Equipment, including data and services, for which special export controls are warranted because of their capacity for substantial military utility or capability. This includes all classified articles, and subsets of sixteen of the nineteen categories listed as Defense Articles on the U.S. Munitions List (USML, a part of the ITAR).

Public Domain: This is information that is available to anyone. Commonly thought of as what is available in any college or university through standard textbooks. If you think about it, this is stuff that you cannot patent, claim a trade secret, or cry proprietary information about. There is a very good chance that if you do not want to tout your actions as in the public domain, and as such not applicable for the ITARs.

PRIOR APPROVAL AND HELP

In some cases relating to "significant military equipment," you have to get approval by the State Department *before* you even give a proposal to certain foreign persons. Such a "proposal" is any presentation describing equipment or services (for example, T&E

services) and which includes performance characteristics, prices, and probable availability for delivery, if the value is more than \$14,000,000, and is intended for delivery and/or end-use in (or by) a country which is not a NATO ally. There are exceptions, but the thresholds are not difficult to breach today. (By the way: just what information have you made accessible through your homepage? Are you sure it's not ITAR-controlled?)

OK: it looks like you are involved in ITAR-type business, and you need help. What to do? As noted above, you can contact your export control officer. For you Government program managers, your local base should have a security officer or "foreign disclosure" officer. You can download some useful files from the Internet. The ITAR and other help is available at a State Department web site:

<http://www.pmdtc.org>.

The underlying can be researched from:

<http://www.access.gpo.gov/mara/cfr/cfr-table-search.html>.

For more information, you can also try

<http://www.siaed.org>.

TIPS ON THE LICENSING PROCESS

What do you really need to attach to a license application? The forms require you to *fully* describe what is being exported/imported. Exercise some reasonableness here, please. Do not just say "receiver kit," when in fact what is being exported is a complete ELINT system, with source code for all software systems, as well as covert emplacement system. Likewise, do not call a fourth-generation night vision system simply a "TSPI Instrument." On the other hand, you do not have to list every piece of lint that you will be handling. If a socket wrench set is needed, you do not have to list every single socket by size and manufacturer. (Yes, there have been license applications like that.) Meanwhile, make sure that you *carefully and patiently* plan to your T&E project, including Munitions Export Controls time. From the time you submit your application, expect to wait 3 months or more to get a license. Approval is never guaranteed. Plan with that in mind.

Assuming the State Department approves your license, it might come back with some provisos (restrictions). Proviso clauses could include controls on, say, source code, radiation-hardened circuits, and technologies

enabling the MIRVing of re-entry vehicles. If the provisos pose obstacles, you can ask for either a clarification, or reconsideration. Such appeals are not looked upon prejudicially. You can help your cause by justifying clearly every export action you intend to take. If source code is being released, attach a copy of it. Note for potential reviewers whether references to specific US systems are included. If all data are directly from materials in the "public domain," emphasize that. If you are involving foreign citizens on your design team, include information on their past projects and access. Whenever applicable, attach full copies of previous licenses, including provisos attached. Sending more information will not slow down processing of your application. But a lack of required or key information could result in a back-and-forth, time-wasting effort – and/or an "approval" you cannot live with.

RECORD KEEPING

Once you are done with a project which required a license, you are not through. If it was a proposed agreement that was not concluded, you must return the license within 60 days. If you terminated a "technical assistance agreement," you have 30 days to return the license. But your duties are not over yet. You must maintain complete records of the license and application, available for review, for a minimum of five years after the expiration of the license (normally, four years from the date the license is approved). The official words are:

Records maintained under this section shall be available at all times for inspection and copying by the Director, Office of Defense Trade Controls, or a person designated by the Director (the Director of Diplomatic Security Service or a person designated by the Director of the Diplomatic Security Service or another designee), or the Commissioner of the U.S. Customs Service or a person designated by the Commissioner.

A FEW MORE CAUTIONS

US export regulations distinguish between ITAR-controlled items and "dual-use" items. Exports of dual-use items are controlled under the Commerce Department, under a separate regulation that's ten times thicker than the ITAR. Beware: you might be a T&E expert with an arsenal of dual-use T&E equipment, all

set to go overseas and support a project. But if the *object* of your T&E support is controlled by the ITAR, you may be performing ITAR-controlled defense services.

If you have any doubt about whether your activity or property is ITAR-controlled, you should ask the State Department for a "commodity jurisdiction" (CJ) determination. The CJ process has similarities to the licensing process. But the State Department's reply to you is not a license – but it may contain a warning that you must obtain a license prior to export.

So if you're planning for *both* CJs and licenses, factor in at least six months instead of three, to get all the go-aheads you may need. Do not assume anything! Customs could detain and even seize your equipment or data if it gets to port and they're unconvinced that you're in

compliance (like having a proper license). Remember our earlier comments about the IRS? Customs and IRS both work for the US Treasury. Got worry yet?

Remember: when it comes to the ITAR, non-compliance is not an option. Plan accordingly. Be honest. Be thorough. Don't omit details in your applications. Tell all, clearly. Get your questions answered in writing. Pursue getting your licenses diligently, but with patience. When someone reviewing your case asks you for more information, be as ready as you can to respond immediately. If you need more time, be prompt. If your T&E business employs or tests modern or advanced technologies, and you interact with non-US citizens and/or locations or destinations outside the US, it's in your best interests to have familiarity with the ITAR.

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